92-456

No. ___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BELL HELICOPTER TEXTRON, INC., a division of Textron, Inc.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, in a third party contribution against the United States arising out of injury to a federal employee, the federal government is entitled to avail itself of the exclusive remedy protections afforded private employers by the worker's compensation act of the place where the act or omission occurred?

PARTIES TO THE PROCEEDINGS

The appellants in the proceedings below were Bell Helicopter Textron Inc., a division of Textron, Inc.; Sea Airmotive, Inc.; Gay Airways Inc.; A.E. Gay, Inc.; and A.E. Gay. The appellee was the United States of America.

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OPINIONS BELOW

The original memorandum decision of the District Court for the District of Alaska is not reported, and appears at p. 30a of the Appendix. The 1987 opinion of the United States Court of Appeals for the Ninth Circuit is reported at 833 F.2d 1375, and appears at p. 21a of the Appendix. On remand, the decision of the district court is reported at 755 F. Supp. 269, and appears at p. 9a of the Appendix. The Court of Appeals for the Ninth Circuit considered the case for a second time on June 15, 1992. That opinion is reported at 967 F.2d 307, and appears at p. 1a of the Appendix.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered and filed on June 15, 1992. The jurisdiction of this Court to review the judgment in question is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved, 5 U.S.C. § 8116(c), 28 U.S.C. §§ 1346(b) and 2674, and Alaska Stats. §§ 09.16.010(a) and 23.30.055, are reproduced at p. 39a of the Appendix.

I. STATEMENT OF THE CASE

On June 13, 1979, federal employees William J. Harrigan and Gary Mitchell were injured when the helicopter in which they were riding crashed near Port Hardy, British Columbia. The pilot, Lt. William Harrigan, an officer of the National Oceanographic and Atmospheric Administration (hereinafter "NOAA") had failed to properly calculate his fuel consumption en route from Alaska to British Columbia. A subsequent examination of the aircraft by the Canadian Ministry of Transport revealed the fuel supply had been exhausted and that the engine had flamed out due to fuel starvation. In attempting to land the helicopter, Lt. Harrigan executed an improper autorotation, and the aircraft fell approximately 40 feet to the ground. As a result of the crash, passenger Gary Mitchell, a civilian employee of NOAA, was rendered a paraplegic, and Lt. Harrigan also sustained serious injuries.

Messrs. Mitchell and Harrigan sued Bell Helicopter Textron, Inc., the manufacturer of the aircraft, as

well as Sea Airmotive, Inc. and Gay Airways, Inc., the seller and lessor of the aircraft, respectively, in the Superior Court for the State of Alaska, Third Judicial District at Anchorage. During the course of that litigation, the injured parties asserted a claim on behalf of the United States government pursuant to the Medical Care Recovery Act, 42 U.S.C. § 2651, *et seq.*, for medical care rendered to the two men. Mitchell's claims against all defendants were ultimately dismissed in exchange for a structured settlement costing the defendants approximately $2,400,000. As part of the settlement terms, the United States government was to receive approximately $250,000 in satisfaction of a Federal Employees' Compensation Act lien for services and benefits provided to Mitchell under the referenced act. 5 U.S.C. § 8132, *et seq.*

Bell, Sea Airmotive, and Gay Airways thereafter sought indemnity or contribution from the United States government pursuant to the terms of the Federal Tort Claims Act. 28 U.S.C. § 1346, *et seq.*[1] Jurisdiction in the United States District Court for the District of Alaska was conferred by the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 *et seq.*

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[1] Lt. Harrigan's claims against all defendants were also settled before trial. However, because the *Feres-Stencel* doctrine precludes contribution and indemnity claims in cases involving injured military personnel, no third-party recovery is sought for monies paid to Lt. Harrigan. *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153 (1950); *Stencel Aero Engineering Corp. v. United States*, 43 U.S. 666, 97 S. Ct. 2054 (1977). *See also United States v. Johnson*, 481 U.S. 681, 107 S. Ct. 2063, at 2069-70 (1987), wherein this Court held that "We reaffirm the holding of *Feres* that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."

After receiving the complaint, but before filing its answer, the government moved to dismiss the action on the ground that the Alaska law precludes contribution and indemnity actions against negligent employers. In dismissing Bell's claims, the district court focused upon the exclusive remedy provision of the Alaska Worker's Compensation Act, Alaska Stat. § 23.30.055, but failed to consider the comparative negligence principles underlying the state's contribution act, Alaska Stat. § 09.16.010 - .060.[2] Judgment in favor of the United States was entered on June 20, 1986. Appendix, *infra*, at 37a. Bell timely appealed the ruling on July 21, 1986.

On December 9, 1987, the United States Court of Appeals for the Ninth Circuit held that the exclusive remedy provision of the Alaska Worker's Compensation Act protected the United States from a third-party contribution claim, but remanded for further proceedings that portion of the judgment which had dismissed the plaintiffs' claims for common law indemnification. Appendix, *infra*, at 21a.

On December 27, 1990, the district court dismissed Bell's indemnification claim. Appendix, *infra* at 9a. That decision was affirmed by the United Court of Appeals for the Ninth Circuit on June 15, 1992. Appendix, *infra*, at 1a.

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[2] The Alaska Contribution Among Joint Tortfeasors Act, Alaska Stat. § 09.16.010 - .060, was repealed by Initiative Proposal No. 87-2, § 2, effective March 5, 1989. *See also* § 9 ch. 139 SLA 1986, which governs all causes of action accuring after June 11, 1986, and which is therefore inapplicable to this case. *See Ogle v. Craig Taylor Equip. Co.*, 761 P.2d 722 (Alaska 1988).

Bell now petitions this Court for a writ of certiorari to review the December 9, 1987 decision of the United States Court of Appeals for the Ninth Circuit.

II. SUMMARY OF ARGUMENT

In *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 103 S. Ct. 1033 (1983), this Court held that the Federal Employees' Compensation Act, 5 U.S.C. § 8101 *et seq.*, (hereinafter "FECA") does not bar contribution and indemnity actions against the United States notwithstanding the lack of direct tort liability between an injured federal employee and the government. Since contribution and indemnity claims against the United States are brought pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b), which in turn looks to "the law of the place where the act or omission occurred," the instant matter required the district court to examine Alaska tort law to determine whether Bell was entitled to maintain a third party action against the United States.

Neither the district court nor the Court of Appeals for the Ninth Circuit examined state laws of contribution; instead, they erroneously looked to the exclusive remedy provision of the Alaska Worker's Compensation Act, Alaska Stat. § 23.30.055, and held that since the state statute shields private employers from third party contribution claims, the federal government is similarly protected. However, reference to the worker's compensation statute of the place where the act or omission occurred serves little or no purpose in a cogent analysis of contribution claims against the government. State acts have nothing to do with the federal employment relationship, and the private immunities incorporated within the Alaska Worker's

Compensation Act were never intended to, nor can they, extend to the United States government.

III. REASONS FOR GRANTING THE PETITION

The question presented herein clearly warrants this Court's plenary review. First, it is virtually impossible to harmonize the court of appeals' decision with this Court's holding in *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 103 S. Ct. 1033 (1983). Although *Lockheed* did not squarely address the precise issue involved here, both the legislative history of FECA and the jurisdictional background of *Lockheed* controvert the government's argument that the exclusive remedy provisions of state worker's compensation acts should extend to the United States.

Second, this case involves an important question of law which warrants review by this Court. The federal government functions as an employer throughout the United States, and virtually every state has a worker's compensation act incorporating an exclusive remedy provision. The question of whether state worker's compensation protections should extend to the United States has arisen in other jurisdictions with uneven results, necessitating clarification by this Court. *See* pp. 17-22 *infra*.

A. Decision of The Ninth Circuit Court of Appeals Conflicts With Lockheed Aircraft Corp. v. United States

Perhaps the most compelling reason justifying review by this Court is the failure of the court of appeals to reconcile its own analysis with this Court's holding in *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 103 S. Ct. 1033 (1983). Indeed, absent intervention by this Court, the Ninth Circuit decision effec-

tively emasculates the rationale of *Lockheed*. The conflict is best illustrated by a brief historical review of FECA and the judicial turmoil which ultimately led to *Lockheed*.

i. Legislative History of Federal Employees' Compensation Act Indicates That State Immunities Were Never Intended To Extend to Federal Torts

When Congress originally passed the Federal Employees' Compensation Act in 1916, its concern was to provide federal employees with a swift, economical, and assured right of compensation, irrespective of any fault on the part of the United States or its employees. *Weyerhauser S.S. Co. v. United States*, 372 U.S. 597, 600, 83 S. Ct. 926, 928 (1963). As originally enacted, FECA contained no provision stating that it was the federal worker's sole remedy against the government. However, because the Federal Tort Claims Act did not yet exist, sovereign immunity insulated the government from tort actions by injured employees. *Lockheed*, 460 U.S. at 193-94, 103 S. Ct. at 1036.

The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674 *et seq.*, became effective in 1946, and permitted actions sounding in tort to be brought against the United States. Because the exclusive remedy provision of FECA had not yet been adopted, confusion immediately arose as to whether the benefits payable to an injured federal worker were limited to those prescribed by FECA or whether the employee could instead sue the government in tort. Most courts considering the issue held that the injured party could elect either remedy, but not both. *E.g.*, *Canon v. United States*, 188 F.2d 444 (9th Cir. 1951); *Parr v. United States*, 172 F.2d 462 (10th Cir. 1949). *See also*, *Dahn v. Davis*, 258 U.S. 421, 42 S. Ct. 320 (1922).

Other courts declared that even after the injured employee had received his FECA benefits, no statutory bar precluded him from filing suit for additional compensation. *E.g., White v. United States*, 77 F. Supp. 316 (D.N.J. 1948).

With the enactment of the Federal Tort Claims Act and such statutes as the Suits in Admiralty Act[3] and the Public Vessels Act[4], the government found itself barraged with a large number of suits by injured employees. In addition, the inadequacy of benefits available under FECA had prompted federal workers to seek relief under these more general statutes. *Weyerhauser, supra*, 372 U.S.597, 601, 83 S. Ct. 926, 929.

Even in those cases where an injured federal employee attempted to recover compensation benefits from the government by suing pursuant to the Federal Tort Claims Act, neither the government nor the federal courts invoked the immunities of the forum state's worker's compensation statute. Virtually every state had enacted an exclusive remedy provision within its worker's compensation scheme, but these state protections did not bar actions against the government. The situation created sufficient concern to the government that in 1949, Congress added a new subsection making the FECA benefits exclusive and in place of any and all other legal liability of the United States or its instrumentalities. *See generally, Weyerhauser, supra*, 372 U.S. 597, at 601-02, 83 S. Ct. 926, at 929 (1963), which contains a detailed history of FECA.

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[3] 46 U.S.C. § 741 *et seq.*

[4] 46 U.S.C. § 781 *et seq.*

The legislative history underlying the 1949 amendments to FECA belies the assertion that the immunities of various state worker's compensation statutes were intended to be incorporated into the Federal Tort Claims Act.

First, the exclusive liability provision of FECA was modeled in part after an analogous provision in the New York workmen's compensation law. By 1949, when FECA incorporated its exclusive remedy provision, New York courts had already construed the state law to permit third-party indemnity actions against negligent employers. *See, e.g., Westchester Lighting Co. v. Westchester County Small Estate Corp.*, 15 N.E. 2d 567 (N.Y. 1938); *Gorham v. Arons*, 76 N.Y.S.2d 850 (1947) (quoted in *Lockheed Aircraft Corp. v. United States*, 460 U.S. at 194 n.4, 103 S. Ct. at 1036 n.4.).

Second, a Senate Report observed that most state worker's compensation acts specified that the benefits payable thereunder would be the exclusive remedy. *Weyerhauser, supra*, 372 U.S. 597, at 601 n.5, 83 S. Ct. at 929 n.5. Obviously, had the Federal Tort Claims Act been intended to incorporate the state immunities available to private employers, Congress could have drafted FECA to simply invoke state protections.[5] Instead, because the interpretation of FECA was a matter of federal, and not state, law, Congress found it necessary to amend the statute.

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[5] Virtually every state except Illinois has incorporated an exclusive remedy provision within its worker's compensation scheme. While such provisions generally bar third-party contribution claims, some do not. *E.g., Galimi v. Jetco, Inc.*, 514 F.2d 949 (2d Cir. 1975) (construing New York law); *Skinner v. Reed-Prentice Div. Package Machinery Co.*, 374 N.E.2d 437 (Ill. 1978).

After enactment of the exclusive remedy amendment in 1949, the federal courts became more uniform in their interpretation of FECA, and consistently held that 5 U.S.C. § 8116 was intended to constitute the sole governmental remedy available to an injured federal employee or his dependents. Again, the matter continued to remain one of federal, and not state, law. *E.g.*, *Travelers Ins. Co. v. United States*, 493 F.2d 881 (3rd Cir. 1974); *Wilson v. Knoxville Community Development Corp.*, 451 F. Supp. 1168 (E.D. Tenn. 1978).

In passing the exclusive remedy provision of FECA, Congress sought to protect the interests of injured employees by crafting a "quid pro quo" compromise which guaranteed, while at the same time limited, the benefits that an injured worker could receive from the government. *See Lockheed*, 460 U.S. at 195, 103 S. Ct. at 1037. The "quid pro quo" formula exists only within the employment relationship, but its purpose and application are compromised once a third party is sued. For example, if, as here, a third party either settles with the injured worker or is held partially liable for his injuries, the government can reclaim medical and FECA benefits paid to the injured employee, thus reducing the government's ultimate liability to little or nothing. One half of the "quid pro quo" formula is therefore lost. Certainly, had Congress intended that the "quid pro quo" would preclude third-party contribution and indemnity claims against the government, it could have expressly stated so in the statute.

Nothing in FECA suggests that it is designed to place upon third parties, such as Bell, the full burden of fully compensating injured federal employees when

the government is largely at fault for the resulting injuries.

In *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 103 S. Ct. 1033 (1983), this Court held that the exclusive remedy provision of FECA was never intended to protect the United States government from indemnity actions even though the injured party had already received federal benefits. "Section 8116(c) was intended to govern only the rights of employees, their relatives, and people claiming through or on behalf of them. These are the only categories of parties who benefit from the 'quid pro quo' compromise that FECA adopts." 460 U.S. at 196, 103 S. Ct. at 1038.

Nothing in *Lockheed* suggests that the rule articulated therein would not extend with equal force to a contribution action. In fact, this Court went so far as to distinguish a 1952 case which held that no substantive right to contribution was available under the particular set of facts involved therein.[6] Because neither the Federal Tort Claims Act nor FECA distinguishes between contribution and indemnity actions, there is similarly no statutory ground for suggesting

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[6] "Since the validity of the substantive indemnity claim is not before us, the [Longshoremen's & Harbor Workers' Contribution Act] cases on which the dissent relies, post, at 2-4 are entirely irrelevant. In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), decided four years before *Ryan* and eleven years before *Weyerhauser*, the court merely held that a substantive right of contribution did not exist in the circumstances of that case. The court explicitly left open the issue of whether such a right to contribution, if it were to exist, would be subject to LHWCA's exclusive liability provision." 460 U.S. at 198 n.8, 103 S. Ct. at 1038 n.8.

that the government should be immune from contribution actions where the injured party is a federal employee.

ii. Review of Lockheed Discloses That This Court Never Intended to Extend Protections of Local Worker's Compensation Acts to the United States

The Federal Tort Claims Act provides, in pertinent part, that the government shall be liable in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Claims against the United States for contribution and indemnity may be entertained pursuant to the provisions of the act, *United States v. Yellow Cab Co.*, 340 U.S. 543, 71 S. Ct. 399 (1951), necessitating examination of the forum state's contribution laws. *See, e.g., Uptagrafft v. United States*, 315 F.2d 200 (4th Cir. 1963), *cert. denied*, 375 U.S. 818, 84 S. Ct. 54 (1963).

In the proceedings below, neither the district court nor the court of appeals examined the contribution law of Alaska, which has been broadly construed by the Alaska Supreme Court.[7] Rather, the Court of

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[7] The petitioners had invited the district court to certify to the Alaska Supreme Court the question of whether a third party may pursue a contribution action against a negligent actor who bears no direct tort liability to the injured party. The district court declined to do so.

Not only has the Alaska Supreme Court broadly construed the Alaska Contribution Among Joint Tortfeasors Act, Alaska Stat. § 09.16.010 *et seq.*, but it has embraced principles of pure comparative negligence as well. *Kaatz v. State*, 450 P.2d 1037 (Alaska 1975). The statute itself does not require direct tort liability between the injured party and the contribution defendant; instead, the latter need only be "liable in tort for the same

Appeals for the Ninth Circuit held that because the exclusive remedy provision of the Alaska Worker's Compensation Act[8] precludes third-party claims against negligent private employers, the federal government is necessarily immune from a contribution action where the injured party is a federal employee. The analogy is unconvincing.

First, an identical argument was implicitly rejected in *Lockheed*. The *Lockheed* case originated in the United States District Court for the District of Columbia, and was appealed to the Court of Appeals for the District of Columbia Circuit before progressing to this Court. *Thomas v. Lockheed Aircraft Corp.*, Case No. 75-1831 (D.D.C. Dec. 7, 1979) (unreported); *Thomas v. Lockheed Aircraft Corp.*, 665 F.2d 1330 (D.C. Cir. 1981).

The District of Columbia's worker's compensation act incorporates the provisions of the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C.

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injury to person or property. . . ." Alaska Stat. § 09.16.010(a). That same language elsewhere has been construed to permit third party contribution claims against a negligent employer notwithstanding an exclusive remedy provision in the state worker's compensation scheme. *Doyle v. Rhodes*, 440 N.E. 2d 895 (Ill. App. 1982). The Alaska Supreme Court has been openly critical of the exclusive remedy provision of the Alaska Worker's Compensation Act, Alaska Stat. § 23.30.055, as it precludes the equitable distribution of fault among wrongdoers. *Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426 (Alaska 1979). The court has further refused to extend the provisions of the Alaska worker's compensation scheme to actions which are primarily federal in nature. *Anderson v. Alaska Packers Ass'n*, 635 P.2d 1182 (Alaska 1981); *Barber v. New England Fish Co.*, 510 P.2d 806 (Alaska 1973).

[8] Alaska Stat. § 23.30.055.

§ 901 *et seq.*, and has been judicially determined to bar third-party contribution and indemnity claims against negligent employers. *E.g.*, *Myco, Inc. v. Super Concrete Co., Inc.*, 565 A.2d 293 (D.C. App. 1989); *Murray v. United States*, 405 F.2d 1361 (D.C. Cir. 1968); *McMillan v. Inter-Royal Corp.*, 532 F. Supp. 111 (D.D.C. 1982). In *Lockheed*, this Court commented that the district court had held that Lockheed had a right to indemnity under the governing substantive law. 460 U.S. at 198 n.8, 103 S. Ct. at 1038 n.8. The Court of Appeals did not rule on that issue, and accordingly it was not considered by this Court. *Id.*

If the analysis embraced by the court of appeals were correct, then it is remarkable that the United States would have confined its argument in *Lockheed* to an analysis of FECA without so much as an attempt to incorporate the immunities of the District of Columbia worker's compensation act. Additionally, if the immunities of local worker's compensation systems in fact serve to protect the federal government, then *Lockheed* would have been little more than an exercise in futility—hardly the type of holding to prompt an emphatic dissent:

> The court's opinion today does more than permit a new and, in my view, inappropriate kind of claim to defeat the limitation of liability principle. It also greatly expands the liability to which the government may be subjected on account of injuries to its employees.

460 U.S. at 203, 103 S. Ct. at 1041 (J. Rehnquist, dissenting).

Second, it should be readily apparent that the United States is not subject to the various require-

ments of the Alaska Worker's Compensation Act, Alaska Stat. § 23.30.045 *et seq.* Instead, the government is bound by the obligations and protections of FECA and not by the compensation scheme of Alaska or any other state. *See United States v. Georgia Public Serv. Comm'n*, 371 U.S. 285, 83 S. Ct. 397 (1963); *Public Utilities Comm'n v. United States*, 355 U.S. 534, 78 S. Ct. 446 (1958); *Demetriadis v. United States Postal Serv.*, 465 F. Supp. 597 (E.D.N.Y. 1979). The court of appeals has never explained why the government, which clearly is not obligated to tender to an injured employee the more generous benefits payable under Alaska's worker's compensation statute, should nevertheless avail itself of the protections of that act.

Lockheed unequivocally holds that payments pursuant to FECA do *not* constitute the government's exclusive liability in contribution and indemnity claims by unrelated third parties. The court of appeals' assumption that a state worker's compensation act may be substituted for FECA misconstrues the underlying history and rationale of *Lockheed*.

In 1987, in a dissent criticizing the application of the *Feres* doctrine[9] (not herein relevant), at least four justices of this Court apparently interpreted *Lockheed* to permit third-party contribution and indemnity

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[9] *Feres v. United States*, 340 U.S. 135 (1950), provides that an on-duty serviceman who is injured due to the negligence of government officials may not recover against the United States under the Federal Tort Claims Act. In *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 97 S. Ct. 2054, this Court held that the Federal Tort Claims Act did not permit the government to be impleaded as a third-party defendant in cases involving injured military personnel.

claims against the federal government in cases involving injured civilian employees. In *United States v. Johnson*, 481 U.S. 681, 107 S. Ct. 2063, 95 L. Ed. 2d 648 (1987), Justice Scalia observed that where, as here, a civilian employee is injured as a result of governmental negligence, the employee is barred from directly suing the government in tort, but may sue a third party manufacturer, who, in turn, may implead the government under *Lockheed* "even though the [employee] was compensated under a statute that contains an exclusive remedy provision (FECA)." 107 S. Ct. at 2075. Despite earlier references in the discussion to state worker's compensation acts, the analysis refused to invoke the exclusive remedy provision of the forum's worker's compensation statute as a bar to the hypothetical manufacturer's third-party claim.

The misplacement of the peculiar solicitude thus far paid toward Alaska's worker's compensation act may be demonstrated by examining the relationship between the injured employee and state legislative interests. In the case at bar, neither Gary Mitchell nor William Harrigan was a resident of Alaska. Neither was employed by an Alaskan company. Neither was injured in Alaska, nor was either man operating under a contract of hire made in Alaska. The two men had been dispatched from a NOAA vessel to ferry a recently leased helicopter from Alaska to Seattle, Washington and the injuries resulted from an accident in Canada. Any connection between the accident and the state of Alaska is so tenuous as to nullify the state's interest in the compensation benefits payable to the injured parties. Certainly, where injured federal employees have already received the full benefits payable

to them under FECA, and where this Court has held that the federal statute does not preclude contribution and indemnity claims by joint tortfeasors, the state of Alaska can have little interest in extending its own exclusive remedy provisions to protect the United States from actions by a third party.

In *Lockheed*, this Court noted that the decision of whether or not to permit third-party contribution and indemnity actions against employers is a problem common to all worker's compensation systems. 460 U.S. at 193, n.3, 103 S. Ct. at 1036, n.3. Certainly, had this Court intended that the exclusive liability provision of FECA should be dependent upon state worker's compensation statutes, it could have easily included that directive in its discussion of state acts. It did not. Reference to state worker's compensation schemes is therefore improper.

This Court's prior refusal to extend the exclusivity provisions of local worker's compensation statutes to the United States government cannot be harmonized with the court of appeals' decision to do just the opposite. Accordingly, the petition for review should be granted.

B. This Case Represents an Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court

Supreme Court Rule 10.1(c) suggests that review on a writ of certiorari is justified when the case involves an important question of federal law which has not been, but should be, settled by this Court. Such a critical question is involved in the matter at bar.

The federal government acts as the employer of numerous civilian employees in every state, and its

presence is widely felt. Resolution of the immediate issue will not only have nationwide impact, but will help to quell the confusion which has overshadowed third-party claims against the government since 1983.

Before *Lockheed*, many courts, including the United States Court of Appeals for the Ninth Circuit, had held that state worker's compensation laws should not be invoked when construing FECA, as "this is an area of federal law which calls for uniformity." *E.g.*, *Ward By & Through Ward v. United States Dept.of Labor*, 726 F.2d 516, 518 (9th Cir. 1984). Because of the widespread, albeit incorrect, assumption that the exclusive remedy provision of FECA precluded third-party claims against the government, the United States had steadfastly maintained that reference to local worker's compensation statutes was inappropriate. The rationale of the decision below does not harmonize with other Ninth Circuit guidelines for construing FECA, nor can it be reconciled with the firmly entrenched instructions of other courts of appeals.

It is well established that in determing whether the United States may be sued for contribution and indemnity by joint tortfeasors in actions arising from injuries to federal employees, federal courts should first look to the underlying state law of contribution and indemnity. *In re All Asbestos Cases*, 603 F. Supp. 599 (D. Hawaii 1984). By contrast, examination of the forum state's worker's compensation act is of little value, since the exclusive remedy provision of FECA implicates federal concerns, and is to be resolved as a matter of federal, not state, law. *E.g.*, *Glover v. Johns-Manville Corp.*, 525 F. Supp. 894, 899 (E.D. Va. 1979), *aff'd*, 662 F.2d 225 (4th Cir. 1981); *Sheridan v. DiGiorgio*, 372 F. Supp. 1373 (E.D.N.Y.

1974), *aff'd*, 505 F.2d 727 (2d Cir. 1984), *cert. denied*, 420 U.S. 990, 95 S. Ct. 1424 (1974).

In *Travelers Ins. Co. v. United States*, 493 F.2d 881, at 883-84 (3d Cir. 1974), the United States Court of Appeals for the Third Circuit explained that the federal government's liability to third persons under FECA is a matter which requires interpretation of a federally-created immunity, if any, rather than a state-created immunity, and as such should be resolved as a matter of federal law. Similarly, in *Galimi v. Jetco, Inc.*, 514 F.2d 949, 952 (2d Cir. 1985), the United States Court of Appeals for the Second Circuit correctly described the most logical approach to the issue:

> When the employee works for the United States, the issue is further complicated by the fact that the federal government's liability in tort is a statutory creation, an exception to the general rule that the sovereign is immune from suit. Although the FTCA incorporates the states' common law rules of negligence, 28 U.S.C. § 2674, it also provides for exceptions to those rules. [Cites omitted.] Congress retains the power to modify the FTCA by means of other statutes. Whether it has done so in the manner asserted by the United States in this case is a question of federal law.

Curiously, the Ninth Circuit Court of Appeals' holding below conflicts with two of its own earlier decisions. In *Ward By & Through Ward*, *supra*, the heirs of two federal employees killed in the crash of a Hughes helicopter claimed benefits under FECA, and

also filed a wrongful death action in state court against the manufacturer of the aircraft. The state trial court held for Hughes, finding that the crash was caused by the failure of other government employees to re-install a main rotor retaining nut. However, in exchange for the agreement of the heirs not to appeal the lower court judgment, Hughes entered into a post-settlement agreement with the claimant. The government sought to recover from the settlement the value of benefits provided under FECA.

In affirming summary judgment for the government, the court of appeals observed that nothing in 5 U.S.C. § 8132 suggests that the government's negligence is a factor which affects its right to reimbursement. In cases involving similar factual situations, the California Supreme Court had reached the opposite result with respect to an employer's right to reimbursement under the California worker's compensation system. However, the court of appeals observed that "this is an area of federal law which calls for uniformity, because a federal employee's rights under the FECA should not depend where in the country he is located." 726 F.2d at 518. For the same reasons that a uniform application of FECA was desirable in *Ward*, so it is desirable here.

Moreover, in *Wright v. United States*, 719 F.2d 1032 (9th Cir. 1983), the Ninth Circuit Court of Appeals rejected an argument reminiscent of that now advanced by the government. There, an alleged tax violator sued the United States for malicious prosecution arising out of the activities of an I.R.S. agent. The government argued that because causes of action under the Federal Tort Claims Act are determined by state law, and because public employees are immune

from liability for malicious prosecution under California law, the United States should have similarly been immune. The court of appeals rejected that argument, and held that federal, rather than state, law should govern the scope of federal immunities.[10]

Indeed, it makes little sense to permit fortuity of the situs of the alleged negligence to define whether the government may be impleaded in a third-party contribution action. It is difficult to impute to Congress such a radical departure from established law in the absence of express Congressional command.

The government's invocation of state law seems as selective as it is irrational.[11] Although the United States contends that a state worker's compensation

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[10] "The Federal Tort Claims Act provides much-needed relief to those suffering injury from the negligence of government employees. We should not, at the same time that state courts are striving to mitigate the hardships caused by sovereign immunity, narrow the remedies provided by Congress . . . . There is no justification for this court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered, that is the function for the same body that adopted it."

719 F.2d at 1034-35 (citing *United States v. Muniz*, 374 U.S. 150, 164-66, 83 S.Ct. 1850, at 1858-59 (1963).

[11] The government has twice invoked FECA, rather than the Alaska Worker's Compensation Act, as the governing substantive law in the proceedings below. The government first turned to FECA in determining its obligations to employee Gary Mitchell, then again invoked FECA when it sought recoupment of those payments through a lien on the underlying personal injury claim. Ironically, since FECA does not shield the government from a third-party contribution action, the United States now argues that the exclusive remedy provision of the *state* act, and not FECA's analogous provision, should protect it from further liability.

law should apply when that law would narrow its liability, it is quick to abandon the argument when state law would broaden the government's liability. For example, in *Galimi v. Jetco, Inc.*, *supra* at 19, the appellant filed a third-party contribution and indemnity action against the United States, and asserted that the matter should be determined according to New York law, which permitted third-party actions against negligent employers. The government disagreed vehemently, and argued that the issue should be decided by looking to FECA alone, without reference to state law. *Id.* at 951-52. Ironically, the government now advances the reverse argument.

If contribution and indemnity actions against the United States, arising out of injuries to federal employees, become dependent upon local worker's compensation statutes, then uniformity of federal law is lost. Instead, the government's immunity, or waiver thereof, would rest upon the regional philosophies of state legislatures and courts. For identical torts resulting in identical injuries to federal employees, the government could find itself subject to contribution or indemnity claims in one state, but not in a neighboring jurisdiction. Surely, such a piecemeal result was not intended by this Court in *Lockheed*.

The judicial confusion regarding the government's liability to third parties under FECA certainly warrants further instruction from this Court. Postponed review of the situation will only engender inconsistency in an area which calls for uniformity.

IV. CONCLUSION

In *Lockheed*, this Court opened the door to third-party actions against the United States where the

injured party is a federal employee, and where the contribution and indemnity laws of the place where the act or omission occurred permit such causes of action. This Court can now do much to introduce consistency and rationality into the resolution of contribution questions by explicitly giving notice to what has long been the underlying rationale of decisions in this area.

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91-35324

BELL HELICOPTER TEXTRON, INC.,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 91-35338

D.C. No.
CV-A-85-685-JKS

OPINION

BELL HELICOPTER TEXTRON, INC.,
Plaintiff,

and

SEA AIRMOTIVE, INC., GAY AIRWAYS, INC., A.E. GAY, INC., and A.E. GAY,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Alaska
James K. Singleton, Jr., District Judge, Presiding

Submitted June 3, 1992*
Seattle, Washington

Filed June 15, 1992

Before: Jerome Farris, William A. Norris, and Alex Kozinski, Circuit Judges.

Opinion by Judge Farris

SUMMARY

Business Law/Contracts

Affirming a district court judgment, the court of appeals held that under *Lake* an express contractual indemnity agreement cannot create a common law indemnity claim because such a claim is barred by Alaska's workers' compensation law; only an express indemnity claim is not barred by this provision.

On remand from a previous appeal, the district court held that appellants Bell Helicopter Textron, Inc., Sea Airmotive, Inc., and Gay Airiways, Inc.'s implied contractual indemnity and noncontractual indemnity claims were barred by the Alaska Workers' Compensation Act, and that other express contractual indemnity claims were not similarly barred but had not been properly raised. The appeals court previously determined that under the Alaska's Workers' Compensation Act, an employer is strictly liable to an employee who is injured in the course of employment. The court noted that in *Lake,* the Alaska Supreme Court held that an employer may be joined as

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* Pursuant to Ninth Circuit Rule 34-4, the panel unanimously finds this case suitable for disposition without oral argument.

a third-party defendant only when another party asserts an express indemnity claim against it. However, there is no basis to conclude that the Alaska Supreme Court would allow a similar action merely because the employer is sued separately.

[1] Although appellants emphasized that under *Providence Washington Ins.*, a common law indemnity claim is not barred by Alaska law if there is a contractual or other duty between the indemnitor and indemnitee, the court noted that under *Lake*, an express contractual indemnity agreement cannot create a common law indemnity claim because such a claim is barred by Alaska law; only an express indemnity claim is not barred by this provision. Consequently, the district court correctly concluded that appellants did not raise an express contractual indemnity claim.

COUNSEL

Jonathon M. Hoffman, Martin, Bischoff, Templeton, Langslet & Hoffman, Portland, Oregon; Susan M. West, Robertson, Monagle & Eastaugh, Anchorage, Alaska, for the plaintiffs-appellants.

Wendy L. Rome, Civil Division, United States Department of Justice, Washington, D.C., for the defendant-appellee.

OPINION

FARRIS, Circuit Judge:

The facts are set forth in our prior opinion in this matter. *See Bell Helicopter v. United States*, 833 F.2d 1375, 1376-77 (9th Cir. 1987). On remand, the district court held

that: (1) Bell's, Sea Airmotive's, and Gay Airways' implied contractual indemnity and noncontractual indemnity claims are barred by the Alaska Workers' Compensation Act and (2) Sea Airmotive's and Gay Airways' express contractual indemnity claims are not similarly barred but have not been properly raised. *Bell Helicopter Textron, Inc. v. United States,* 755 F. Supp. 269 (D. Alaska 1990). We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

We previously determined that, under the Federal Torts Claims Act, 28 U.S.C. § 1346(b), the applicable law is that of Alaska. *Bell Helicopter,* 833 F.2d at 1377-78. Under the Alaska Workers' Compensation Act, an employer is strictly liable to an employee who is injured in the course of employment. *See Lake v. Constr. Mach., Inc.,* 787 P.2d 1027, 1028-29 (Alaska 1990). In return, Alaska Stat. § 23.30.055 provides that the liability prescribed by the Act "shall be exclusive and in place of all other liability of the employer." *See Lake,* 787 P.2d at 1029.

We recognize that our previous opinion contains language that supports Bell's, Sea Airmotive's, and Gay Airways' arguments, but our opinion preceded the Alaska Supreme Court's decision in *Lake.* Based on section 23.30.055, the court in *Lake* held that "an employer may be joined as a third-party defendant only when another party asserts an express indemnity claim against it." *Id.* at 1031. Although *Lake* involved a defendant's attempt to join an employee's employer as a third-party defendant under Alaska Stat. § 09.17.080, there is no basis to conclude that the Alaska Supreme Court would allow a similar action merely because the employer is sued separately. *See Providence Washington Ins. v. DeHavilland Aircraft,* 699 P.2d 355, 357 (Alaska 1985) (section 23.30.055 precludes implied indemnity claim against employer). The parties' implied contractual indemnity and noncontractual indemnity claims therefore must fail.

[1] Sea Airmotive and Gay Airways emphasize that *Providence Washington Ins.* held that a common law indemnity claim is not barred by section 23.30.055 if there is "a contractual or other duty between the indemnitor and indemnitee." *Id.* (footnote omitted). We understand Sea Airmotive's and Gay Airways' argument, but, under *Lake,* an express contractual indemnity agreement cannot create a common law indemnity claim because such a claim is barred by section 23.30.055; *only* an express indemnity claim is not barred by this provision. *See Lake,* 787 P.2d at 1031. Further, "other duty," *Providence Washington Ins.,* 699 P.2d at 357, refers, for example, to the implied duty owed by a manufacturer to a downstream retailer, *see e.g., Koehring Mfg. Co. v. Earthmovers of Fairbanks, Inc.,* 763 P.2d 499 (Alaska 1988), and is not relevant to this case.

Sea Airmotive's and Gay Airways' complaint alleges as follows:

> ***FIRST CLAIM FOR RELIEF***
>
> . . . .
>
> The negligence of defendant, if any, was primary and active while that of plaintiffs, if any, was secondary and passive. Accordingly, plaintiffs are entitled to recover indemnity from defendant for all amounts paid in settlement of the claim brought by Mitchell . . . .
>
> ***SECOND CLAIM FOR RELIEF***
>
> . . . .
>
> By virtue of Alaska's Contribution Statute, AS §§ 09.16.010-09.16.060, and the negligence of defendant's employee, defendant is obligated to reimburse plaintiffs their pro rata portion of the amount paid in settlement of this case.

The district court correctly concluded that Sea Airmotive and Gay Airways did not raise an express contractual indemnity claim.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 91-35324
CT/AG#: CV-85-00685-JKS

BELL HELICOPTER

Plaintiff-Appellant

and

SEA AIRMOTIVE INC.; GAY AIRWAYS INC.; A.E. GAY, INC.; A.E. GAY

Plaintiffs

v.

UNITED STATES OF AMERICA

Defendant-Appellee

NO. 91-35338
CT/AG#: CV-85-00685-JKS

BELL HELICOPTER

Plaintiff

and

SEA AIRMOTIVE INC.; GAY AIRWAYS INC.; A.E. GAY, INC.; A.E. GAY

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA

Defendant-Appellee

FILED

JUL 17 1992

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By Deputy

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cc: Baker
Hoffman
Randell
Judge Singleton
Judge Fitzgerald

APPEAL FROM the United States District Court for the District of Alaska (Anchorage).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Alaska (Anchorage) and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered: 06/15/92

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

JUL 6 1992

By: /s/ Sylvia McAlister
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

Case No. A85-685 Civil

BELL HELICOPTER TEXTRON, INC., a Division of Textron, Inc.; SEA AIRMOTIVE, INC.; GAY AIRWAYS, INC.; A.E. GAY, INC.; and A.E. GAY,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

FILED

DEC 27 1990

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
PRR Deputy

ORDER GRANTING THE UNITED STATES SUMMARY JUDGMENT ON ALL INDEMNITY CLAIMS

On September 28, 1990, this court entered an oral decision on the record granting the United States summary judgment against the plaintiffs. In this written decision, the court will summarize its reasons.

The following facts are not in dispute and are from the Ninth Circuit decision in *Bell Helicopter v. United States*, 833 F.2d 1375, 1376-77 (9th Cir. 1987). On June 13, 1979, a helicopter piloted by Lieutenant William Harrigan, an

officer of the National Oceanographic and Atmospheric Administration ("NOAA"), crashed near Port Hardy, British Columbia. The crash occurred during Harrigan's attempt to land after running out of gas. A passenger, Gary Mitchell, a civilian employee of NOAA, and Harrigan were both seriously injured.

Mitchell and Harrigan sued Bell Helicopter Textron, Inc. ("Bell"), the manufacturer of the aircraft, as well as Sea Airmotive, Inc. ("Sea Air"), and Gay Airways, Inc. ("Gay"), the seller and lessor of the aircraft, respectively, in a consolidated action in Alaska Superior Court. They alleged that Bell, Sea Air and Gay were liable in tort for manufacturing and furnishing the helicopter to the United States ("the government") in an uncrashworthy condition. On February 20, 1985, the case settled for approximately 2.4 million dollars. After the crash, Mitchell also received benefits available to him under the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8101 *et seq.* (1980). Most of these FECA benefits were later repaid to the government by Mitchell as required by statute.

Following the settlement of Mitchell's claims against them, Bell, Sea Air and Gay (collectively "plaintiffs") sued the government for indemnity or contribution pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. 1346 *et seq.* (1976 & Supp. 1990). Plaintiffs argue that the crash occurred because Harrigan was negligent in failing to properly undertake preflight planning procedures in Alaska, by permitting the aircraft to run out of gas, and in refusing plaintiffs' offer to remedy an alleged defect prior to the crash—to provide shoulder harnesses.

District Court Judge James A. Fitzgerald dismissed the action on the grounds that the government, when treated as a private employer, enjoys immunity from claims of contribution and indemnity afforded it under the Alaska Workmen's Compensation Act ("AWCA") (Alaska Stat. §§

23.30.005-.145). Alaska Stat. § 23.30.055 (1984).[1] On appeal, the Ninth Circuit agreed with Judge Fitzgerald that plaintiffs' claims for indemnity and contribution were barred by the exclusive-remedy provision of AWCA. *Bell*, 833 F.2d at 1378-79. In reaching its conclusions, the court relied heavily on its earlier decision in *LaBarge v. County of Mariposa*, 798 F.2d 364 (9th Cir. 1986), *cert denied sub nom. County of Mariposa v. United States*, 481 U.S. 1014 (1987).

Following *LaBarge*, the court affirmed Judge Fitzgerald's conclusion that the federal courts must look to Alaska law to determine questions of contribution and indemnity. The FTCA only extends liability to the government under circumstances where a private person would be liable according to the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b). The court concluded that for purposes of indemnity, the government should be treated as a private employer who would be immune from indemnity by virtue of the exclusivity provision of AWCA.

The court specifically rejected the contention that third-party claims for indemnity were expressly permitted by FECA, thereby distinguishing *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983). The court interpreted *Lockheed* to hold that FECA itself did not preclude third-party claims for indemnity. However, the courts must still look to the underlying substantive law, which in this case is FTCA. The court determined that FTCA requires an interpretation of the law of the state in which the tort occurs, to answer the question of whether state law would permit indemnity and contribution claims by a third party

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[1] 1 Alaska Statute § 23.30.055 (1990) was amended effective July 1, 1988. The amendments apply to injuries sustained on or after July 1, 1988, and therefore would not be applicable to this case. *See* ch. 79, SLA 1988. The amendments added the following sentence: "The liability of the employer is exclusive even if the employee's claim is barred under AS 23.30.022."

against the employer for damages paid to an injured employee.

While the Ninth Circuit largely agreed with Judge Fitzgerald's handling of the case, the court concluded that the district court had failed to address certain issues that must be addressed in order to completely resolve the case. *Bell*, 833 F.2d at 1379. Specifically, questions of express contractual indemnity, implied contractual indemnity, and implied noncontractual indemnity were left open by Judge Fitzgerald's decision. Therefore, the Ninth Circuit remanded the case to address these issues. In so doing, it directed the attention of this district court to two prior decisions, *Northwest Airlines. Inc., v. Alaska Airlines, Inc.*, 343 F. Supp. 826 (D. Alaska 1972) and *Industrial Risk Insurers v. Creole Prod. Servs., Inc.*, 568 F. Supp. 1323, 1328 (D. Alaska 1983), *aff'd*, 746 F.2d 526 (9th Cir. 1984), which the court thought might be helpful on remand.

On remand, the government asked Judge Fitzgerald to enter judgment in its favor arguing that the Ninth Circuit had misconstrued Alaska law. Judge Fitzgerald declined to do so, reasoning that the Ninth Circuit had asked him to consider the requirements set out in *Industrial Risk Insurers* which Judge Fitzgerald concluded would govern further proceedings in this case. The government then filed a motion to dismiss which plaintiffs opposed. In the meantime, the case was reassigned to District Court Judge Andrew H. Kleinfeld. Judge Kleinfeld concluded that the case should be decided on motions for summary judgment rather than on a motion to dismiss, to ensure that all relevant facts would be marshalled and a complete picture of the case disclosed. Thereafter, both parties moved for summary judgment. The case was later reassigned to me, and as a housekeeping measure, I entered an order denying the motion to dismiss without prejudice, to allow consideration of the issues raised in connection with the pending motions for summary judgment.

At the outset, we are faced with the doctrine of the "law of the case." This court should not reexamine an issue previously decided by it or a higher court in the same case in the absence of good cause. *See Richardson v. United States*, 841 F.2d 993, 996 (9th Cir. 1988) *amended*, 860 F.2d 357 (9th Cir. 1988). Good cause exists to reexamine, only where the prior decision overlooked or failed to consider controlling law, where there has been an intervening change in the law, or where the evidence on remand is substantially different on significant issues from the record that existed at the time of the earlier decision. *See, e.g., Planned Parenthood of Cent. & N. Arizona v. Arizona*, 718 F.2d 938, 949 (9th Cir. 1983), *aff'd mem. sub nom. Babbitt v. Planned Parenthood of Cent. & N. Arizona*, 479 U.S. 925 (1986). The Ninth Circuit and Judge Fitzgerald have previously decided that plaintiffs' right to indemnity and contribution is governed solely by the law of the State of Alaska and that in determining whether there is a right to indemnity or contribution, we must consider the government as a private employer who has paid compensation under the Act and is subject to AWCA. *Bell*, 833 F.2d at 1378; *LaBarge*, 798 F.2d at 366-68.[2]

The Ninth Circuit did not determine whether Alaska law would or would not allow indemnity or contribution under the applicable facts. It simply directed this district court to consider those issues and decide them. We are thus faced with three issues. First, would the law of Alaska recognize an action by a third party for indemnity from the employer of an employee injured in part by the actions of the third party based upon an express contract to indemnify, despite the exclusive remedy provision of AWCA?

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[2] Plaintiffs point out that Alaska Stat. § 23.30.055 only shields employers who are subject to the Act and pay compensation under it. They argue that the government does not satisfy this test. *LaBarge* precludes this argument.

The answer is yes. *See Northwest Airlines*, 343 F.2d at 828-29; *Manson-Osberg Co. v. State*, 552 P.2d 654, 658-59 (Alaska 1976).

On appeal, the Ninth Circuit declined to consider the issue of an express right to indemnity because plaintiffs had failed to plead it or present it to the trial court. On remand, the parties seem to believe that the Ninth Circuit has instructed this district court not to consider that issue, but that does not seem to be the thrust of the Ninth Circuit's opinion. Rather, while declining to consider the matter for the first time on appeal, the court did not preclude this district court from considering questions of express indemnity on remand if they were properly presented, either by a motion to amend relevant pleadings, or by presentation in an appropriate motion such as a motion for summary judgment. It is not necessary to address that issue, however, because the parties have not requested that the court do so.[3]

Second, would Alaska law recognize a third party's right to implied contractual indemnity against the employer of the injured employee despite AWCA? Here, the answer seems to be no. *See Lake v.Construction Mach., Inc.*, 787 P.2d 1027, 1031 (Alaska 1990); *see also Providence Washington Ins. Co. v. DeHavilland Aircraft Co.*, 699 P.2d 355, 357-58 (Alaska 1985); *Manson-Osberg Co.*, 552 P.2d at 658-

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[3] The government has argued that if the plaintiffs were seeking express contractual indemnity from the government in an amount in excess of $10,000, the Court of Claims would have exclusive jurisdiction over the case under the Tucker Act. 28 U.S.C. §§ 1346(a)(2), 1491. *See DSI Corp. v. Secretary of Housing & Urban Dev.*, 594 F.2d 177, 180 (9th Cir. 1979). The government also argues that plaintiffs in fact submitted their claims for express indemnity to the Board of Contract Appeals and those claims were rejected on the ground that the contract did not provide for express indemnity. *See Gay Airways. Inc.*, 84-1 B.C.A. (CCH) ¶ 17,199 (1984).

59; *Golden Valley Elec. Ass'n. v. City Elec. Serv., Inc.*, 518 P.2d 65, 69 (Alaska 1974).[4]

Third, would Alaska law recognize a third party's noncontractual right to indemnity against the injured party's employer under the common law despite AWCA? *See* Restatement of Restitution § 76 (1936); Restatement (Second) of Torts § 886(1)(B). This is the most difficult question presented on remand. On the one hand, Alaska law does recognize a noncontractual right to indemnity under some circumstances. *See Fairbanks North Star Borough v. Roen Design Assocs., Inc.*, 727 P.2d 758, 760-62 (Alaska 1986), *appeal after remand, Fairbanks North Star Borough v. Kandik Constr., Inc. & Assocs.*, 795 P.2d 793 (Alaska 1990) (*reh'g granted* for Roen Design on April 17, 1990); *Heritage v. Pioneer Brokerage & Sales, Inc.*, 604 P.2d 1059, 1065-67 (Alaska 1979). Alaska law apparently does not recognize such a right where the third party sues the employer for injury to an employee. *Providence Washington Ins. Co.*, 699 P.2d at 357.

On the other hand, the issue of a noncontractual right to indemnity between a third party held liable to an injured employee and the employer has been specifically reserved by the Alaska Supreme Court. *Arctic Structures. Inc., v. Wedmore*, 605 P.2d 426, 436 n.36 (Alaska 1979); *Golden Valley Elec. Ass'n.*, 518 P.2d at 69 n.16. However, more recent cases suggest that only a third-party's express contractual right to indemnity from the employer will be recognized. *See, e.g., Lake*, 787 P.2d at 1031.

Having carefully reviewed the authorities, I am satisfied that Alaska law would not recognize an action for implied noncontractual indemnity by the plaintiffs against the gov-

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[4] It would appear that a claim for implied contractual indemnity, as opposed to implied noncontractual indemnity, for an amount greater than $10,000 would also be within the exclusive jurisdiction of the Court of Claims. *See* 28 U.S.C. §§ 1346 (a) (2), 1491.

ernment under the undisputed facts of this case. A number of reasons lead me to this conclusion.

First, *Northwest Airlines* and *Industrial Risk Insurers* are not on point. *Northwest* involved express contractual indemnity and *Industrial Risk Insurers* did not involve an attempt to recover indemnity from an employer protected by AWCA's exclusive remedy provision for damages paid to an injured employee.

Second, *Industrial Risk Insurers*, 568 F. Supp. at 1328, establishes a three-part test that must be met in order for a noncontractual right of indemnity to arise under Alaska law. The test requires that the indemnitee must discharge a legal obligation, *i.e.*, a tort liability to a third party. This requirement is met in this case. The other two requirements are that the indemnitor must also be liable to the third party for the same obligation, and as between the indemnitee and the indemnitor, the obligation ought to be discharged by the latter. *Id.*

The government was not liable in tort to Mitchell because of the exclusive remedy provision of AWCA. *See Providence Washington Ins. Co.*, 699 P.2d at 357.[5] In addition, Alaska law would not support a finding that the government, rather than plaintiffs, ought to discharge the plaintiffs' tort obligation to Mitchell. *See State v. Wien Air Alaska, Inc.*, 619 P.2d 719, 720 (Alaska 1980). This latter conclusion finds support in a number of considerations.

Alaska had adopted the Uniform Contribution Among Tortfeasors Act at the time this case arose. *See* former

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[5] It is lack of a common tort obligation that apparently bars a claim for contribution. *Lake*, 787 P.2d at 1031. The reasons for this are considered in a lucid opinion by the Maryland Supreme Court in *Montgomery County v. Valk Mfg. Co.*, 317 Md. 185, 562 A.2d 1246 (1989). These reasons would be equally applicable to an action for implied noncontractual indemnity.

Alaska Stat. §§ 09.16.010-.060 (1983).[6] Contribution, therefore, largely displaced the common law in noncontractual actions for implied indemnity in Alaska. *Vertecs Corp. v. Reichhold Chems., Inc.*, 661 P.2d 619, 625-26 (Alaska 1983). Nevertheless, AWCA precludes the assertion of a contribution claim against the employer even if the employer's negligence was the proximate cause of the employee's injury. *Lake*, 787 P.2d at 1029; *Wien*, 619 P.2d at 720. It would be anomalous to reject the favored remedy—contribution, but recognize the disfavored remedy—implied noncontractual indemnity. *Cf. State Mechanical, Inc. v. Liquid Air Inc.*, 665 P.2d 15, 17-18 n.2 (Alaska 1983) (declining to expand common law indemnity to overlap and judicially abrogate portions of the Contribution Act).

Even if AWCA were not a bar, plaintiffs could not prevail on a theory of implied noncontractual indemnity under the facts of this case. Generally, implied indemnity requires a preexisting duty to indemnify arising out of the pretort relationship between the alleged indemnitor and indemnitee. *Providence Washington Ins. Co.*, 699 P.2d at 357-58. The relationship is usually contractual. The Alaska Supreme Court has recognized an implied right to indemnification by a principal held vicariously liable for the tort of its agent. *Moses v. McGarvey*, 614 P.2d 1363, 1373-74 (Alaska 1980); *Austin v. Fulton Ins. Co.*, 498 P.2d 702, 704-05 (Alaska 1972) (relying on Restatement (Second) of Agency §§ 399 & 401).

Strict liability for marketing a defective product was apparently the theory of recovery. The plaintiffs were not held liable to Mitchell on the theory that a principle was liable for the negligence of its agent, the government.

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[6] The Uniform Act was repealed by Initiative Proposal No. 87-2, § 2, effective March 5, 1989. See also § 9 ch. 139 SLA 1986 which governs all causes of action accruing after June 11, 1986, and therefore would not apply to this case. *See Ogle v. Craig Taylor Equip. Co.*, 761 P. 2d 722 (Alaska 1988).

Alaska recognizes a right of a retailer, downstream in the chain of distribution of a manufactured article, sued on a theory of strict liability, to obtain indemnity from the manufacturer. *Koehring Mfg. Co. v. Earthmovers of Fairbanks, Inc.*, 763 P.2d 499, 502-04 (Alaska 1988); *Ross Laboratories, Div. of Abbott Laboratories v. Thies*, 725 P.2d 1076, 1081 (Alaska 1986); *D.G. Shelter Prods. Co. v. Moduline Indus., Inc.*, 684 P.2d 839, 841 (Alaska 1984). Alaska would not, however, recognize a right in the manufacturer found strictly liable, to seek indemnity from those downstream in the distribution chain, whose negligence contributed to the total loss. *Koehring*, 763 P.2d at 504 n.7 (citing *Allison Steel Mfg. Co. v. Superior Court*, 20 Ariz. App. 185, 511 P.2d 198, 202-03 (1973)).

Under Alaska law, where the manufacturer is strictly liable and the retailer or downstream user of the article is negligent, neither would appear to be entitled to indemnity from the other, though each could arguably seek contribution under the contribution statute. *Id.; cf. Ogle*, 761 P.2d at 725 (apparently recognizing a right to contribution between a manufacturer and a retailer under such circumstances). *See also Rabon v. Automatic Fasteners, Inc.*, 672 F.2d 1231, 1235 (5th Cir. 1982) (applying Florida law and holding that one who is strictly liable for a defective product, is not merely vicariously liable so as to be entitled to implied indemnity from those whose negligent use of the defective product causes injury to others); *Symons v. Mueller Co.*, 526 F.2d 13, 17-19 (10th Cir. 1975) (same—applying Kansas law); *W.D. Rubright Co. v. International Harvester Co.*, 358 F. Supp. 1388, 1398-1400 (W.D. Pa. 1973) (cited with apparent approval in *Ogle*, 761 P.2d at 725 n.4) (implying that those strictly liable and those who are negligent are both tortfeasors under the act).[7]

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[7] This is clear under current Alaska law. *See* Alaska Stat. § 09.17.900 (Supp. 1990) which defines "fault" to include both negligence and strict

If the government's servant, Harrigan, misused the product, or he or Mitchell assumed the risk of any defect, that might have insulated the plaintiffs from liability to Mitchell. *See Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 883 (Alaska 1979). It would not have created a duty in the government to indemnify the plaintiffs. *See Santisteven v. Dow Chem. Co.*, 506 F.2d 1216, 1219-20 (9th Cir. 1974) (applying Nevada law). Finally, the government did not fly the helicopter. Its servant, Harrigan, did. The government's liability, if any, would be vicarious based on the doctrine of *respondeat superior*. The government would therefore be as much without fault as the plaintiffs, although this would be based on different doctrines of liability. Thus, there is no reason why Alaska law would hold the vicariously liable employer morally obligated to pay the strictly liable manufacturer's obligation to the injured employee.

IT IS THEREFORE ORDERED:

The government is entitled to summary judgment against all plaintiffs, dismissing all claims for contribution and indemnity.[8]

DATED at Anchorage, Alaska this 26 day of December 1990.

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liability. It is less clear under former law. *See Koehring*, 763 P.2d at 502-04 (holding that as between a manufacturer and a lessor both liable to a third party on the basis of strict liability, the lessor was entitled to indemnity because it was not at fault in the sense used in *Vertecs*). In context, the court was simply applying the rule that those downstream in the distribution chain were entitled to indemnity from those upstream and not vice-versa. *Id.* at 504 n.7. The supreme court in *Koehring* seems to agree with the reasoning I have used in this case.

[8] *Fairbanks North Star Borough v. Kandik Constr.*, 795 P.2d 793 (earlier decision *Fairbanks North Star Borough v. Roen Design*, 727 P.2d 758) is not inconsistent with the decision in this case. It did not involve a claim by a third party to recover indemnity from an employer whose employee was injured by the third party.

/s/ James K. Singleton, Jr.
JAMES K. SINGLETON, JR.
United States District Court Judge

cc: R. Baker (ROBERTSON)
J. Hoffman
U.S. Attorney

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 86-3990; 86-4056

D.C. No. CV-A85-685-JMF
OPINION

Appeal from the United States District Court for the District of Alaska
James M. Fitzgerald, District Judge, Presiding

Argued and Submitted
August 5, 1987—Anchorage, Alaska

Filed December 9, 1987

Before: Alfred T. Goodwin, J. Blaine Anderson and Melvin Brunetti, Circuit Judges.

Opinion by Judge Anderson

SUMMARY

Torts/Governmental Torts

Appeal from judgment. Vacated and remanded.

A helicopter piloted by Harrigan crashed in British Columbia seriously injuring Harrigan and passenger Mitchell. Mitchell sued Bell Helicopter Textron, Sea Airmotive, and Gay Airways in Alaska. The case was settled. After the crash, Mitchell also received benefits available to him under the Federal Employees Compensation Act (FECA). Most of these FECA benefits were later repaid to the United States by Mitchell as required by statute. Following

this settlement, appellants Bell, Sea Airmotive, and Gay Airways sued the appellee United States for indemnity or contribution pursuant to the Federal Tort Claims Act (FTCA). The district court dismissed this action on the grounds that the government, when treated as a private employer, enjoys immunity from claims of contribution and indemnity afforded to it under Alaska Workers Compensation Act (AWCA).

[1] Appellants contend that this court should apply Alaska's whole law, including its choice-of-law rules, while the government asserts that there is no need to consider any choice-of-law rules. Appellants suggest that the issue of immunity should be determined on the basis of the workers' compensation law under which the injured party was employed. Under FECA, indemnity actions against the United States brought by unrelated third parties are not directly barred. [2] There are several flaws with this argument. First, this is not a conflicts issue. [3] Second, since the underlying substantive law in this case is the FTCA, it directs this court to apply Alaska law which will not allow this suit to be maintained. [4] A similar argument made to this court has been rejected. [5] Also, a party cannot raise an issue for the first time on appeal. Thus appellants' argument of express contractual indemnification must fail. [6] Appellants argue that they have a non-contractual right of implied indemnity from the government. The question is whether the requirements for common law indemnity have been satisfied. [7] Alaska law also provides that concurrent tortfeasors are not entitled to indemnification. Thus if implied indemnity requirements are met, this issue must also be determined. [8] This court agrees with the district court's ruling in dismissing the action. However, this court finds that appellants' claim of implied indemnity must be determined by the district court.

COUNSEL

Jonathan M. Hoffman, Martin, Bischoff, Templeton, Biggs & Ericson, Portland, Oregon; Susan M. West, Robertson, Monagle & Eastaugh, Anchorage, Alaska, for the plaintiffs-appellants.

Richard R. Stone, Sr., Tara C. Neda, United States Department of Justice, Washington, D.C. for the defendant-appellee.

OPINION

ANDERSON, Circuit Judge:

The appellants in this action challenge the district court's order dismissing all of their claims for contribution and indemnity. The district court held that, by analogy, the United States, when treated as an employer, enjoys the same immunity afforded to private employers under the Alaska Workers' Compensation Act, AS 23.30.055 ("AWCA"). Therefore, since a private employer who pays workers' compensation is immune from third-party actions against them for contribution or indemnity, the United States is also immune.

I.

In a flight from Anchorage, Alaska to Seattle, Washington on June 13, 1979, a helicopter piloted by Lt. William Harrigan, an officer of the National Oceanographic and Atmospheric Administration ("NOAA"), crashed near Port Hardy, British Columbia. The crash occurred during Harrigan's attempt to land after running out of gas. As a result of the crash, passenger Gary Mitchell, a civilian employee of NOAA, and Harrigan were seriously injured.

Mitchell sued Bell Helicopter Textron, Inc., the manufacturer of the helicopter, Sea Airmotive, Inc., the seller of the helicopter, and Gay Airways, Inc., the lessor of the

helicopter ("Appellants") in Superior Court for the State of Alaska. Mitchell alleged that these parties were liable in tort for manufacturing and furnishing the helicopter to the government in an uncrashworthy condition. On February 20, 1985, the case was settled for approximately $2.4 million. After the crash, Mitchell also received benefits available to him under the Federal Employees Compensation Act ("FECA"), 5 U.S.C. §§ 8101, *et. seq.* Most of these FECA benefits were later repaid to the United States by Mitchell as required by statute.

Following this settlement, Bell, Sea Airmotive, and Gay Airways sued the United States ("the government") for indemnity or contribution pursuant to the Federal Tort Claims Act ("FTCA"). 28 U.S.C. § 1346. *et. seq.* Appellants alleged that the crash occurred because Harrigan was negligent in failing to properly undertake prelight planning procedures in Alaska.

The district court dismissed this action on the grounds that the government, when treated as a private employer, enjoys immunity from claims of contribution and indemnity afforded to it under AWCA.

II.

A district court's legal conclusions regarding the United States' amenability to a third-party suit under the Federal Tort Claims Act are reviewed de novo. *LaBarge v. Mariposa County*, 798 F.2d 364, 365 (9th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1889, 95 L.Ed.2d 497 (1987).

This suit is brought pursuant to the FTCA which acts as a limited waiver of the government's sovereign immunity. Under this Act, district courts have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any government employee

while acting within the scope of his office or employment. This liability extends to circumstances where the government, if a private person, would be liable according to the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b). The FTCA further provides that the United States shall be liable for those tort claims in the same manner and to the same extent as a private individual under like circumstances. 28 U.S.C. § 2674. This Court has determined that these provisions "direct the courts to analogize the government to a private actor in a similar situation and apply state law to determine amenability to suit and substantive liability." *LaBarge* at 366.

[1] The act or omission at issue, pilot's negligent preflight planning, occurred in Alaska. We must, therefore, look to the law of Alaska. It is at this point that the parties to this action disagree. Appellants content that we should apply Alaska's whole law, including its choice-of-law rules, while the government asserts that there is no need to consider any choice-of-law rules. Appellants argue that to follow the FTCA which provides that liability is determined "in accordance with the law of the place where the act or omission occurred," federal courts are required to apply the whole law of the state where the act or omission occurred, including the state's conflict of law rules. *Richards v. United States*, 369 U.S. 1, 14 L.Ed.2d 492, 82 S.Ct. 585 (1962). Accordingly, appellants suggest that the issue of immunity should be determined on the basis of the workers' compensation law under which the injured party was employed (i.e., FECA). Under FECA, indemnity actions against the United States brought by unrelated third parties are not directly barred. *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 74 L.Ed.2d 911, 103 S.Ct. 1033 (1983). Thus, appellants should be allowed to proceed with this action.

[2] There are several flaws with this argument. First, this is not a conflicts issue. The cases appellants use to support their argument pertain to multistate tort activity

where a distinction was made between the law of the forum and the place of injury. In this case, we are not debating this issue. It has been agreed that the law of the forum will be applied. The question to be answered is how Alaska law would be applied to an Alaska employer in similar circumstances. There is no need to apply the doctrine of depecage.

[3] Second, *Lockheed* permits third party suits against the United States for indemnity, despite the exclusive remedy provision of FECA if the third party is unrelated. However, to determine if a suit could be maintained, it is necessary to look to the underlying substantive law. The underlying substantive law in this case is the FTCA. It directs us to apply Alaska law which will not allow this suit to be maintained.

[4] Third, a similar argument made to this court was rejected in *LaBarge*. In *LaBarge*, the county was seeking contribution from the United States after settling a tort claim with the estates of three federal Secret Service agents who were killed after colliding with a county sheriff's patrol car. 798 F.2d at 365. The county argued that the suit was brought pursuant to the FTCA, which looked to the application of California (forum) law, which in turn looked to the relevant out-of-state employer's workers' compensation law (FECA). *Id.* at 368.

This Court found that although FECA permits a third-party suit, it does not confer the underlying substantive right to sue. The right to sue must exist independently of FECA's passive allowance of the exercise of that right. Thus, this Court found that while FECA does not bar a third-party claim, there is a vacuum as to substantive law which would give rise to the claim. *LaBarge*, 798 F.2d at 368.

Appellants attempt to distinguish *LaBarge* because the tort there occurred within the forum state and involved a forum resident. In the instant action, the injury occurred

outside Alaska. Mitchell was hired and employed outside the state, and he was subject to another workers' compensation system. However, under the FTCA, we are required to treat the government as a private employer in similar circumstances so the only distinction would be that the accident occurred outside the forum state.

In *LaBarge*, the court responded to the county's argument that the United States should be treated as a private employer, doing business outside California who happened to bring in a few temporary employees for a temporary job in-state, by recognizing that the United States is more like a national corporation doing business in all the states. Thus, this Court recognized that the United States had a presence in California despite the fact that some of the injured employees were stationed out of state.

The *LaBarge* court went on to recognize the equities presented in that case and the arguable unfairness of requiring the county to pay for the United States' negligence. But this did not prevent the Court from finding that since California law barred a contribution suit when the employer was subject to workers' compensation law, the suit against the United States was also barred.

In determining that the United States' payment of FECA benefits was comparable to the payment of state workers' compensation benefits, this Court noted that the statutory language of the FTCA of "like circumstances" does not refer to the same circumstances but rather to those under similar circumstances. Since the federal government could never be exactly like a private actor, this Court found that to apply this standard, it is a court's job to find the most reasonable analogy. Because FECA is comparable to a state workers' compensation law, all other things being equal, the United States should be entitled to the same immunity from suit enjoyed by a private employer covered by state workers' compensation laws. *LaBarge*, 798 F.2d at 366-67.

This suit was filed pursuant to the FTCA. Consequently, the United States, which has the standing of a litigant doing business in all fifty states and is subject to the immunities provided by the state law in whichever state the action is brought, is immune because an Alaska employer under the same circumstances would be immune.

III.

[5] Although we find that appellants' claims are barred under the exclusivity provision of AWCA, we must also consider appellants' claim of express or implied indemnity under Alaska law. A party cannot raise an issue for the first time on appeal. Thus appellants' argument of express contractual indemnification must fail. In the proceeding below, appellants did not argue express contractual indemnification. Rather, in their complaint they sought indemnity on the grounds that the government's negligence was primary and active, while theirs was secondary and passive. In addition, in their Memorandum in Opposition to Defendant's Motion to Dismiss, appellants argued that they were entitled to recover indemnity because they met common law indemnity requirements. Since the "unspoken element" in implied indemnity cases is the existence of contractual or other duty, appellants used the language in the contract (where the government agreed to assume all risk of loss) as evidence of implied, not express, contractual indemnification. Because appellants did not raise the issue of express contractual indemnification, we are foreclosed from considering it on this appeal.

The district court order which granted the government's motion to dismiss stated that the order was granted because the government, in FTCA actions, should be treated as a private employer covered by state workers' compensation schemes. Since a private employer enjoys the immunity from claims of contribution and indemnity afforded to it under the exclusive remedy provision of A.S. 23.30.055, so does the government. The district court also

found that Alaska's choice-of-law rules were not an issue in the case. The district court, however, did not address the implied right of indemnity issue.

[6] The exclusivity provisions of AWCA do not preclude express or implied contractual indemnity. *Northwest Airlines, Inc. v. Alaska Airlines, Inc.*, 343 F. Supp. 826 (D. Alaska 1972). If the government agreed to assume the risk of loss, there may be a right of indemnity separate from the right of contribution. The issue of whether implied indemnity exists must be answered. Appellants argue that they have a noncontractual right of implied indemnity from the government. The question is whether the requirements for common law indemnity provided in *Industrial Risk Insurers v. Creole Product Services*, 568 F.Supp. 1323, 1328 (D. Alaska 1983), *aff'd*, 746 F.2d 526 (9th Cir. 1984), have been satisfied. These requirements are (1) indemnity claimant has discharged a legal obligation owed to a third party, (2) the defendant is also liable to the third party, and (3) between the indemnity claimant and the defendant, the defendant ought to discharge the obligation.

[7] Alaska law also provides that concurrent tortfeasors are not entitled to indemnification. *Vertecs Corp. v. Reichhold Chemicals, Inc.*, 661 P.2d 619, 626 (Alaska 1983). Thus if implied indemnity requirements are met, this issue must also be determined. These issues should have been addressed by the district court.

[8] We agree with the district court's ruling that the United States, when treated as an employer, enjoys immunity from claims of contribution and indemnity afforded to it by the exclusivity provision of AWCA. However, we find that appellants' claim of implied indemnity must be determined by the district court. We vacate the order of dismissal and remand for further proceedings consistent with this opinion.

No costs are allowed to any party. The request for attorney's fee is DENIED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

No. A85-685 Civil

BELL HELICOPTER TEXTRON, INC., a division of Textron, Inc., SEA AIRMOTIVE, INC., GAY AIRWAYS, INC.; A.E. GAY, INC.; and A.E. GAY,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

FILED
JUN 18 1986

MEMORANDUM AND ORDER

On June 13, 1979, a Bell Model 206B helicopter crashed in British Columbia, Canada. The pilot William J. Harrigan and his passenger Gary Mitchell, both employees of the National Oceanographic and Atmospheric Administration survived the accident but sustained serious injuries. Neither pilot Harrigan or passenger Mitchell were based nor resided in Alaska. Passenger Mitchell sued Bell Helicopter Textron, Inc., (Bell) the manufacturer of the helicopter, Sea Airmotive, Inc., the seller of the helicopter and Gay Airways, Inc., the lessor of the helicopter in Superior Court for the State of Alaska. Mitchell alleged that they were liable in tort for manufacturing and furnishing the helicopter to the government in an uncrashworthy condition. The case was ultimately settled on February 20, 1985 for the approximate amount of $2,400,000. Mitchell also re-

ceived benefits available to him under the Federal Employees Compensation Act, 5 U.S.C. §§ 8101 *et seq.*

Bell, Sea Airmotive and Gay Airways instituted suit in this court on December 18, 1985, seeking indemnity and contribution from the government under the Federal Tort Claims Act (FTCA) 28 U.S.C. §§ 1346(b), 2671 *et seq.* The government has moved to dismiss the complaint on the basis that Alaska law bars indemnity and contribution claims against employers. For the reasons stated below I agree.

Plaintiffs' Bell, Sea Airmotive and Gay Airways suggest that this court should look to Alaska's choice-of-law rules and apply federal substantive law contained in the Federal Employees Compensation Act (FECA), 5 U.S.C. §§ 8101 *et seq.* However, plaintiffs assert that this court has jurisdiction over their claims under the FTCA.

Under the FTCA, the government is liable only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred", 28 U.S.C. § 1346(b). In the case at bar, plaintiffs have alleged that pilot Harrigan was negligent in failing to properly undertake pre-flight planning procedures in Anchorage, Alaska. Thus, I find it necessary to look to Alaska law in determining whether the government is liable for indemnity or contribution.

In Alaska, a private employer would be covered by the Alaska Workers Compensation Act, 23.30.005-23.30.270. The Alaska Supreme Court has held that the exclusive remedy provision of the Act, 23.30.055[1] bars third-party claims for indemnity and contribution against an employer. *State v. Wien Air Alaska,* 619 P.2d 719 (Alaska 1980).

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[1] A.S. 23.30.055 provides in relevant part:

The liability of an employer prescribed in A.S. 23.30.045 is exclusive and in place of all other liability of the employer . . .

Plaintiffs suggest that Alaska courts would, under a choice-of-law rules analysis, apply federal substantive law in determining whether the government is immune from suit. In *Lockheed Aircraft Corp. v. United States,* 460 U.S. 190 (1983) the Supreme Court held that the exclusive-liability provision of the Federal Employees Compensation Act, 5 U.S.C. § 8116(c), does not directly bar a third-party indemnity action against the United States. However, *Lockheed* does not automatically entitle third parties to bring indemnity or contribution claims against the government. The Court noted that the existence of such a remedy is governed by the underlying substantive law. *Lockheed,* 460 U.S. 197-98. *Lockheed* only stands for the proposition that the FECA does not present a bar to third-party claims against the United States as the validity of Lockheed's underlying substantive claim was not before the court. *Id.* at 199.

In this case the applicable substantive law is the FTCA. The FTCA proscribes that the government's liability shall be determined "in accordance with the law of the place where the act or omission occurred" 28 U.S.C. § 1346(b). To apply the provisions of FECA and the holding of *Lockheed* to plaintiffs' claims would be inconsistent with the plain terms of the FTCA.

The issue of whether the government in FTCA actions should be treated as a private employer covered by state workers' compensation schemes even though it does not partcipate in the state's program has been addressed and answered in the affirmative by several federal courts. *See e.g., In re All Maine Asbestos Litigation* (PNS Cases) 772 F.2d 1023, 1028 (1st Cir. 1985); *General Elec. Co. v. United States,* 603 F.Supp. 881, 884 (D. Md. 1985) and *Giannuzzi v. Doninger Metal Products,* 585 F.Supp. 1306, 1310 (W.D. Pa. 1984). In *Giannuzzi,* the court stated:

> Congress enacted the Federal Employees Compensation Act to assist the federal government

> achieve its goal of becoming a "model employer" . . . In a realistic sense, the Act is the government's "answer to Workman's Compensation, . . . first enacted in Pennsylvania three years prior to the passage of the FECA" . . . That the federal program rather than the state program paid benefits to plaintiff is not significant. Because Pennsylvania law requires private employers to pay premiums to the workman's compensation fund and because federal law requires the United States to be a private employer in tort cases, it can be assumed for litigation purposes that the requirement of a "quid pro quo" has been satisfied. We hold the fact that the federal government did not make payments to the Pennsylvania workman's compensation fund does not affect the bar of state law in a tort suit against the United States or an employer.
>
> 585 F.Supp. at 1310.

I find the reasoning of *Giannuzzi* to be more persuasive than that of the unreported decision of *LaBarge et al. v. County of Mariposa,* No. CV-F-83-174 REC (E.D. Cal. 1984). Plaintiffs rely on *LaBarge* in support of their contention that federal substantive law in FECA should be applicable to this case. However, *LaBarge* ignores the proper analysis to be followed under the FTCA.

Finally, I find Alaska's choice-of-law rules not to be in issue in this case. In *Richards v. United States,* 369 U.S. 1 (1962) the Supreme Court held that in multistate tort actions the FTCA "requires application of the whole law of the state where the act or omission occurred", including its choice of law rules. However, the facts of *Richards* are distinguishable from the case at bar. By the very terms of plaintiffs' complaint and by agreement of the parties this court is not faced with a multistate tort action which necessitates application of Alaska's choice-of-law rules.

I conclude that the government when treated as a private employer enjoys the immunity from claims of contribution and indemnity afforded to it by A.S. 23.30.055.

The clerk is directed to enter a final order dismissing plaintiffs' claims and the government's motion to dismiss is GRANTED.

DATED this 18 day of June, 1986, at Anchorage, Alaska.

/s/ James M. Fitzgerald
James M. Fitzgerald
United States District Judge

cc: Robert Baker (ROBERTSON, MONAGLE)
Lloyd Ericsson
U.S. Attorney

BELL HELICOPTER *Plaintiff*	ROBERT BAKER, ESQ. (907) 277-6693 [COR LD NTC ret] ROBERTSON, MONAGLE, EASTAUGH & BRADLEY 550 W 7th Avenue Suite 1290 Anchorage, AK 99501
SEA AIRMOTIVE, INC. *Plaintiff-Appellant*	TIMOTHY E. MILLER, ESQ. (503) 224-3113 [COR LD NTC ret] JONATHAN M. HOFFMAN, ESQ. (503) 224-3113 [COR LD NTC ret] JOAN L. VOLPERT, ESQ. (503) 224-3113 [COR LD NTC ret] MARTIN, BISCHOFF, TEMPLETON, BIGGS & ERICSSON 2900 First Interstate Tower Portland, OR 97201 LLOYD ERICSSON, ESQ. (907) 276-1277 [COR LD NTC ret] MARTIN, BISCHOFF, TEMPLETON, BIGGS & ERICSSON 555 West Northern Lights Blvd. Suite 207A Anchorage, AK 99503

GAY AIRWAYS, INC. *Plaintiff-Appellant*	JONATHAN M. HOFFMAN, ESQ.
A.E. GAY, INC. *Plaintiff-Appellant*	(See above) [COR LD NTC ret]
A.E. GAY *Plaintiff-Appellant*	JONATHAN M. HOFFMAN, ESQ. (See above) [COR LD NTC ret]
V.	
UNITED STATES OF AMERICA *Defendant-Appellee*	U.S. Attorney for Alaska, Anchorage (907) 271-5071 Rm. C-252 [COR LD NTC aus] U.S. DEPT. OF JUSTICE 701 "C" Street Anchorage, AK 99513 RICHARD R. STONE, SR., ATTORNEY (202) 724-8214 [COR LD NTC gov] TARA C. NEDA, ESQ. FTS 724-8214 (202) 724-8214 [COR LD NTC usa] Torts Brach, Civil Division U.S. Department of Justice P.O. Box 14271 Washington, DC 20044-4271

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case Number A85-685

BELL HELICOPTER TEXTRON, INC., *et. al.*,
v.
UNITED STATES OF AMERICA,

FILED
JUN 20 1986

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trail by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT government's Motion to Dismiss is hereby granted, and plaintiffs' claims dismissed.

APPROVED:

/s/ James M. Fitzgerald
James M. Fitzgerald
U.S. District Court Judge

June 20, 1986
Date

JOANN MYRES
Clerk

cc: Robert Baker
(Robertson, Monagle)
Lloyd Ericsson
U.S. Attorney
O&J #2794

/s/ Pamala Sandberg
(By) Deputy Clerk

APPENDIX F

FEDERAL STATUTES AND RULES

5 U.S.C. § 8116(C). Limitations on right to receive compensation.

(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

5 U.S.C. § 8132. Adjustment after recovery from a third person.

If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of that liability as a result of suit or settlement by him or in his behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of compensation payable to him for the same injury. No court, insurer, attorney, or other person shall pay or distribute to the beneficiary or his designee the proceeds of

such suit or settlement without first satisfying or assuring satisfaction of the interest of the United States. The amount refunded to the United States shall be credited to the Employees' Compensation Fund. If compensation has not been paid to the beneficiary, he shall credit the money or property on compensation payable to him by the United States for the same injury. However, the beneficiary is entitled to retain, as a minimum, at least one-fifth of the net amount of money or other property remaining after the expenses of a suit or settlement have been deducted; and in addition to this minimum and at the time of distribution, an amount equivalent to a reasonsable attorney's fee proportionate to the refund to the United States.

28 U.S.C. § 1346(b). United States as defendant.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of

occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefits the action was brought, in lieu thereof.

RULE 10. Considerations Governing Review on Writ of Certiorari.

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should not be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

ALASKA STATUTES

Sec. 09.16.010. Right to contribution. (a) Except as otherwise provided in this chapter, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

[Repealed, 1987 Initiative Proposal No. 2, § 2. For current law, see Alaska Stat. § 09.17.080(d).]

Sec. 23.30.055. Exclusiveness of liability. The liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee at law or in admiralty on account of the injury or death. The liability of the employer is exclusive even if the employee's claim is barred under AS 23.30.022. However, if an employer fails to secure payment of compensation as required by this chapter, an injured employee or the employee's legal representative in case death results from the injury may elect to claim compensation under this chapter, or to maintain an action against the employer at law or in admiralty for damages on account of the injury or death. In that action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of the employment, or that the injury was due to the contributory negligence of the employee.

QUESTION PRESENTED

Whether the United States, when it has paid benefits to an injured federal employee under the Federal Employees' Compensation Act, is entitled to the same immunity from suit by a third party for indemnity or contribution as would inure to a private employer who had paid compensation to an injured employee pursuant to the applicable state workers' compensation law.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-456

BELL HELICOPTER TEXTRON, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The second opinion of the court of appeals (Pet. App. 1a-6a) is reported at 967 F.2d 307. The first opinion of the court of appeals (Pet. App. 21a-29a) is reported at 833 F.2d 1375. The second opinion of the district court (Pet. App. 9a-20a) is reported at 755 Supp. 269. The first opinion of the district court (Pet. App. 30a-38a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1992. A petition for a writ of certiorari was

filed on September 14, 1992 (a Monday).[1] This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 13, 1979, a helicopter leased by the National Oceanographic and Atmospheric Administration (NOAA) and piloted by one of its employees crashed while en route from Anchorage, Alaska, to Seattle, Washington. Passenger Gary Mitchell, a civilian employee of the NOAA, was injured. Pet. App. 23a, 30a.

Mitchell received compensation pursuant to the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.* He also brought a tort action in the Alaska Superior Court against petitioner Bell Helicopter Textron, Inc. (the manufacturer of the helicopter), Sea Airmotive, Inc. (the seller of the helicopter), and Gay Airways, Inc. (the lessor of the helicopter). Mitchell claimed that these parties were liable to him for manufacturing and furnishing the helicopter to the government in an uncrashworthy condition. On February 20, 1985, the parties settled the case for approximately $2.4 million. Pet. App. 23a-24a.

2. Petitioner subsequently sued the United States for indemnity or contribution under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346, 2671 *et seq.*, which waives sovereign immunity under certain circumstances and renders the United States liable

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[1] Sea Airmotive, Inc. and Gay Airways, Inc., also plaintiffs and appellants below, have filed a separate petition for certorari, No. 92-457. The United States was served in these cases at different times, and therefore previously filed its opposition to the petition for certiorari in No. 92-457 on November 13, 1992.

"to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. Petitioner alleged that the crash occurred because the pilot of the helicopter, a federal employee, negligently failed to undertake proper pre-flight planning. Pet. App. 31a.

The district court granted the government's motion to dismiss. Pet. App. 30a-38a. In Alaska,[2] once an employer, pursuant to the state workers' compensation law, compensates an employee for a work-related accident, the employer is not subject to a suit for indemnity or contribution by a third party against whom the employee has recovered in a suit concerning the same accident. *Id.* at 31a. The district court agreed that because the FTCA renders the United States liable only to the same extent as a private party under like circumstances, the government was entitled by analogy to the immunity from contribution or indemnity that state law would have granted a similarly situated private employer. *Id.* at 34a.

3. The court of appeals affirmed the district court's ruling on the contribution issue. Pet. App. 21a-29a. Relying on its earlier decision in *LaBarge* v. *County of Mariposa*, 798 F.2d 364 (9th Cir. 1986), cert. denied, 481 U.S. 1014 (1987), the court considered "how Alaska law would be applied to an Alaska employer in similar circumstances." Pet. App. 26a. Recognizing that "the federal government could never be exactly like a private actor," the court sought "the most reasonable analogy." *Id.* at 27a. Because the court

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[2] The accident occurred in Canada, but the allegedly negligent planning occurred in Alaska, and the parties agreed below that Alaska law applied. Pet. App. 24a, 25a.

found FECA "comparable to a state workers' compensation law," it concluded that the United States was entitled to "the same immunity from suit enjoyed by a private employer covered by" the Alaska law. *Ibid.*

The court of appeals affirmed the dismissal of petitioner's claim for contribution, but also found that the district court had not adequately addressed the claim of implied indemnity and remanded for further consideration of that issue under Alaska law. Pet. App. 28a-29a. On remand, the district court ruled that petitioner could not recover on any theory of indemnity. *Id.* at 30a-38a. The court of appeals affirmed. *Id.* at 1a-6a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court.[3] The courts of appeals that have addressed analogous issues in recent years have adopted similar interpretations of the FTCA. Accordingly, the petition does not present any issue that warrants review by this Court.

1. Petitioner argues that the lower courts looked to the wrong state law in determining the applicable "law of the place where the act or omission occurred"

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[3] Petitioner argues that the judgment of the court of appeals contradicts this Court's holding in *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190 (1983), that FECA does not itself bar a third-party action for indemnity. Pet. 11-12. The United States addressed this argument in its opposition to the petition for certiorari in *Sea Airmotive, Inc.* v. *United States*, No. 92-457, a copy of which has been served on counsel in this case.

under the FTCA, 28 U.S.C. 1346(b). Pet. 12-17. Petitioner claims that the government should not enjoy the immunity that Alaska workers' compensation law would provide to a private employer from claims for indemnity or contribution.

a. First, petitioner argues that *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190 (1983), "implicitly rejected" the analogy adopted by the court of appeals. Petitioner reasons that this result is foreclosed because the government did not argue in *Lockheed*, and the Court did not find, that the District of Columbia workers' compensation law barred the plaintiff's third-party claim. Pet. 13-14, 17. The only issue decided by the court of appeals and presented to this Court in *Lockheed*, however, was whether the exclusive liability provision of FECA, 5 U.S.C. 8116(c), itself barred an action for indemnity. 460 U.S. at 197 n.8. What this Court did not say in response to an argument that was not before it is not the law. What this Court did say in *Lockheed* was that it was remanding the case for consideration of whether the plaintiffs were entitled to recover under the relevant substantive law of the District of Columbia.[4]

b. Second, petitioner argues that, because the United States is not directly subject to the requirements of the Alaska Workers' Compensation Act, it therefore should not receive the benefit of that statute. Pet. 14-16. In numerous situations, the courts of appeals have held that the federal government should receive the advantage of a state statute

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[4] Petitioner's speculations about how Congress might have worded FECA, Pet. 9, are similarly irrelevant.

that would protect an analogous private party from tort liability, even though the statute does not literally apply to the federal government.

For instance, in addition to the court of appeals in this case, two other courts of appeals have held that the federal government should receive the same immunity from a third-party suit for indemnity or contribution as a private employer would enjoy under a state workers' compensation law. *General Electric Co.* v. *United States*, 813 F.2d 1273 (4th Cir. 1987), vacated on other grounds, 484 U.S. 1022 (1988); *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023 (1st Cir. 1985), cert. denied, 476 U.S. 1126 (1986). Several courts have held that the United States may take advantage of a state statute placing a cap on damages in a medical malpractice suit, even if the state statute literally applies only to medical facilities that have a state license which the federal medical facility in which the malpractice occurred did not have. *Starns* v. *United States*, 923 F.2d 34 (4th Cir.), cert. denied, 112 S. Ct. 54 (1991); *Taylor* v. *United States*, 821 F.2d 1428 (9th Cir. 1987), cert. denied, 485 U.S. 992 (1988); *Lucas* v. *United States*, 807 F.2d 414 (5th Cir. 1986). Courts have also held that state statutes limiting the liability of private landowners who open their land to the public for recreational purposes likewise limit the liability of the United States for injuries to users of national parks regardless of whether the state statute was intended to apply to government-owned land. *Proud* v. *United States*, 723 F.2d 705 (9th Cir.), cert. denied, 467 U.S. 1252 (1984); *Mandel* v. *United States*, 719 F.2d 963 (8th Cir. 1983). And the courts have applied state

"collateral source" statutes, which by their terms cover only state-licensed health care providers, to reduce the liability of the United States for medical malpractice occurring in federally operated facilities. *Reilly* v. *United States*, 863 F.2d 149 (1st Cir. 1988); *Scheib* v. *Florida Sanitarium & Benevolent Ass'n*, 759 F.2d 859 (11th Cir. 1985). Thus, the court of appeals here was correct in permitting the United States to take advantage of the immunity that the state workers' compensation law would have provided to a similarly situated private employer, even though the government was not literally subject to the terms of the law.

2. Petitioner's reliance on *United States* v. *Muniz*, 374 U.S. 150 (1963), and *Wright* v. *United States*, 719 F.2d 1032 (9th Cir. 1983), is misplaced. Those cases involve instances in which the United States may not be entitled to the immunity that state law would afford to a *public* party such as a municipality or public official. The immunity at issue here is one that state law affords to a *private* party, and the FTCA expressly makes the liability of a similarly situated private party under state law the standard for government liability.

3. Finally, petitioner argues that, if third-party claims for indemnity or contribution against the United States, arising out of injuries to federal employees, depend upon the local workers' compensation laws, then the uniformity of federal law construing the FECA will be sacrificed. Pet. 17-22. But petitioner errs in characterizing this case as one requiring construction of FECA; this case concerns the FTCA. And application of analogous state law is

precisely what is required by the FTCA: "the law of the place where the act or omission occurred" supplies the rule of decision. 28 U.S.C. 1346(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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